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FUJITSU LIMITED, and
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

NANYA TECHNOLOGY CORP. and
NANYA TECHNOLOGY CORP. U.S.A.,

Plaintiff,

vs.

FUJITSU LIMITED, FUJITSU
MICROELECTRONICS AMERICA, INC.,

Defendants.

CIVIL CASE NO. 06-CV-00025

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO
IMMEDIATELY TRANSFER FOR
CONVENIENCE**

ORAL ARGUMENT REQUESTED


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DISTRICT COURT OF GUAM
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TABLE OF CONTENTS

I.	Introduction.....	1
II.	Courts May Consider Transfer for Convenience Before Establishing Jurisdiction.....	2
III.	The Convenience Issues Are Straightforward and Strongly Favor Transfer.....	3
A.	Applicable Convenience Law	3
B.	The Case Should Clearly Be Transferred to the Northern District of California for Convenience.....	5
1.	Nanya Could Have Brought This Action in the Northern District of California.....	5
2.	The Northern District of California Is More Convenient for FMA and Nanya USA -- Both California Corporations.....	5
3.	The Northern District of California Is More Convenient for Fujitsu.....	6
4.	The Northern District of California Is Nearly As Convenient for Nanya....	6
5.	The Northern District of California Is More Convenient for Experts, Third Parties and Third Party Witnesses	7
6.	The “Interests of Justice” Strongly Favor Transfer to the Northern District of California	8
7.	The Balance of Convenience Favors Transfer to the Northern District of California.....	8
IV.	The Jurisdictional Issues Are Difficult and Uncertain.....	9
A.	Nanya's Broad Jurisdictional Discovery Requests Are Causing Unnecessary Expense and Burden.....	9
B.	Resolving Questions of Personal Jurisdiction Will Be Difficult at Best	10
V.	The Court Should Immediately Transfer for Convenience	11
VI.	Conclusion	14

TABLE OF AUTHORITIES

Cases

<i>Arley v. United Pac. Ins. Co.</i> , 379 F.2d 183 (9th Cir. 1967).....	4
<i>Copitas v. Fishing Vessel Alexandros</i> , No. 98-00013 (D. Guam Oct. 5, 1998), <i>aff'd</i> , 20 Fed. Appx. 744 (9th Cir. 2001).....	8
<i>Datasouth Computer Corp. v. Three Dimensional Techs., Inc.</i> , 719 F. Supp. 446 (W.D.N.C. 1989)	12
<i>Decker Coal Co. v. Commonwealth Edison Co.</i> , 805 F.2d 834 (9th Cir. 1986).....	4
<i>Donnelly v. Klosters Rederi A/S</i> , 515 F. Supp. 5 (E.D. Pa. 1981)	13
<i>Gulf Oil v. Gilbert</i> , 330 U.S. 501 (1947).....	4
<i>Kahhan v. City of Fort Lauderdale</i> , 566 F. Supp. 736 (E.D. Pa. 1983)	13
<i>Multistate Legal Studies, Inc. v. Marino</i> , 1996 WL 786124 (C.D. Cal. 1996).....	11, 12, 13, 14
<i>Pac. Car & Foundry Co. v. Pence</i> , 403 F.2d 949 (9th Cir. 1968).....	4, 5, 8
<i>Patrickson v. Dole Food Co.</i> , 251 F.3d 795 (9th Cir. 2001).....	2
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981).....	4
<i>Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.</i> , 148 F.3d 1355 (Fed. Cir. 1998).....	10
<i>Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.</i> , No. 06-102, 549 U.S. ___, 127 S.Ct. 1184 (Mar. 5, 2007).....	passim
<i>Storage Tech. Corp. v. Cisco Sys., Inc.</i> , 329 F.3d 823 (Fed. Cir. 2003).....	4
<i>Terukuni Kaiun Kaisha, Ltd. v. C.R. Rittenberry & Assocs., Inc.</i> , 454 F. Supp 418 (S.D.N.Y. 1978).....	13
<i>Triton Container Int'l, Ltd. v. Compania Anomina Venezolana de Navigacion</i> , No. 94-00055, 1994 WL 803257 (D. Guam Dec. 12, 1994).....	4, 5, 8
<i>Van Dusen v. Barrack</i> , 376 U.S. 612 (1964).....	3
<i>X-Rail Sys., Inc. v. Norfolk & W. Ry. Co.</i> , 485 F. Supp. 553 (D.N.J. 1980)	13

Statutes

28 U.S.C § 1404(a)	passim
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1 Defendants Fujitsu Limited (Fujitsu) and Fujitsu Microelectronics America, Inc.
2 (“FMA”) (collectively “Defendants”) hereby move to immediately transfer this case to the
3 Northern District of California for convenience, without prejudice to full consideration of
4 Defendants’ respective motions to dismiss or transfer.¹

5 **I. INTRODUCTION**

6 The U.S. Supreme Court recently issued a decision establishing new guidelines for
7 courts that are addressing complex jurisdictional and transfer issues. In *Sinochem Int’l Co. v.*
8 *Malaysia Int’l Shipping Corp.*, No. 06-102, 549 U.S. ___, 127 S.Ct. 1184 (Mar. 5, 2007), the
9 Supreme Court held that a district court has discretion to immediately consider a motion to
10 transfer for convenience before taking up complicated jurisdictional issues. Consequently, this
11 Court in its discretion may now consider transferring this case to the Northern District of
12 California for convenience before addressing the more complex personal jurisdiction issues raised
13 by Defendants. Should the transfer motion be granted, the jurisdictional issues will be mooted,
14 ongoing expensive jurisdictional discovery, briefing, motion practice and hearings will be
15 avoided, and both the Court and the parties will save substantial resources.

16 Immediate transfer to the Northern District of California under 28 U.S.C. §
17 1404(a) is warranted because that court has jurisdiction over all parties and is a substantially more
18 convenient forum to hear this dispute. All parties have significant contacts with the Northern
19 District of California, and none have significant contacts with Guam. Two of the parties to this
20 action actually reside in the Northern District of California; none reside in Guam. There are
21 substantial documents and witnesses located in the Northern District of California; no documents
22 or witnesses are located in Guam. In short, virtually all of the traditional convenience factors
23 strongly favor a transfer of this case to the Northern District of California.

24 On the other hand, Guam is extremely inconvenient for all parties, and jurisdiction
25 in Guam is hotly contested. Jurisdictional discovery has been and will continue to be burdensome

26 ¹ See Dkt. Nos. 74 and 89. The request is without prejudice because resolution of jurisdictional
27 issues in favor of Fujitsu and/or FMA would further support transfer. For example, if the Court finds that
28 it lacks jurisdiction over FMA, then that would further support transferring Fujitsu to the Northern District
of California for convenience to avoid duplicative parallel litigation.

1 and expensive. For example, Nanya has filed three motions to compel discovery on jurisdictional
2 issues; none of the motions have any merit, but all require substantial resources to address.
3 Following jurisdictional discovery, resolving the jurisdictional issues will still be difficult and
4 uncertain at best. There is no need to get bogged down with jurisdictional issues because transfer
5 for convenience does not involve extensive discovery or difficult questions. Because of the
6 recent *Sinochem* decision, this Court now has the authority to transfer for convenience before
7 considering dismissal for lack of jurisdiction. Defendants thus respectfully request that transfer
8 for convenience be addressed at the earliest opportunity and that this case be transferred.

9 **II. COURTS MAY CONSIDER TRANSFER FOR CONVENIENCE BEFORE** 10 **ESTABLISHING JURISDICTION**

11 In the past, courts in this Circuit have considered motions to transfer for
12 convenience before addressing jurisdiction, in order to avoid unnecessary, burdensome
13 jurisdictional discovery and difficult issues of personal jurisdiction. *See, e.g., Multistate Legal*
14 *Studies, Inc. v. Marino*, 1996 WL 786124 (C.D. Cal. 1996). However, in 2001, the Ninth Circuit
15 came out against this approach in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001).
16 There, the Ninth Circuit reversed a *forum non conveniens* dismissal because the district court did
17 not first satisfy itself of jurisdiction. *Id.* at 800 n.3 (“As the district court recognized, such claims
18 may raise serious questions of forum non conveniens under federal and state law. Of course, the
19 federal courts may decide that issue only if we have jurisdiction over the case.”). Accordingly,
20 consideration of convenience before jurisdiction was contrary to Ninth Circuit precedent when
21 Defendants initially filed their motions to dismiss or transfer.

22 But earlier this month, in *Sinochem*, No. 06-102, 549 U.S. ___, 127 S.Ct. 1184, the
23 U.S. Supreme Court effectively overruled *Patrickson* and held that a district court has discretion
24 to immediately consider a defendant’s *forum non conveniens* plea, and need not take up first any
25 other threshold objection. In particular, a court need not resolve whether it has personal
26 jurisdiction over a defendant if it determines that, in any event, a foreign tribunal is the more
27 suitable arbiter of the merits of the case. Indeed, the Supreme Court *encouraged* district courts to
28 take this approach: “where subject-matter or personal jurisdiction is difficult to determine, and

1 *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes
2 the less burdensome course.” *Sinochem*, 549 U.S. at ___, 127 S.Ct. at 1194. Accordingly, the
3 Supreme Court cleared the way for this Court to consider transferring to the Northern District of
4 California for convenience before considering whether it has jurisdiction.

5 **III. THE CONVENIENCE ISSUES ARE STRAIGHTFORWARD AND STRONGLY**
6 **FAVOR TRANSFER**

7 The Court should immediately transfer to the Northern District of California for
8 convenience. The convenience issues are straightforward and do not require discovery. There is
9 no dispute that two out of the four parties in this action reside in the Northern District of
10 California. None of the parties to this litigation reside in, or have any relevant witnesses or
11 documents in Guam. For example, Defendants do not maintain any offices in Guam and have no
12 operations, affiliates, employees, salespersons or other witnesses in Guam. (See Michael Moore’s
13 Declaration in Support of Fujitsu Microelectronics America Inc.’s Motion to Dismiss or Transfer
14 to the Northern District of California and for a More Definite Statement, December 4, 2006, 06-
15 cv-00025, Dkt. No. 78, (“Moore Decl.”) ¶ 4, attached hereto as Exh. A; Shigeru Kitano’s
16 Declaration in Support of Fujitsu Limited’s Motion to Dismiss or Transfer to the Northern
17 District of California and for a More Definite Statement, December 15, 2006, 06-cv-00025, Dkt.
18 No. 94 (“Kitano Decl.”) ¶ 4, attached hereto as Exh. B.) Guam has no relationship whatsoever to
19 the parties, witnesses or issues in this case, and is the most inconvenient forum in the United
20 States to prepare and try this complex patent infringement litigation. It would be far more
21 efficient to try this case in the Northern District of California -- the location of both U.S. parties’
22 headquarters, documents and fact witnesses.

23 **A. Applicable Convenience Law**

24 Pursuant to 28 U.S.C. § 1404(a), any civil action may be transferred “[f]or the
25 convenience of parties and witnesses, in the interest of justice ... to any other district or division
26 where it might have been brought.” The purpose of transfer under this section is to “prevent the
27 waste of time, energy and money and to protect litigants, witnesses and the public against
28 unnecessary inconvenience and expense.” *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964)

(citations omitted). In furtherance of this purpose, § 1404(a) provides this Court with broad discretion to adjudicate motions to transfer. *See Arley v. United Pac. Ins. Co.*, 379 F.2d 183, 185, n.1 (9th Cir. 1967).²

Though § 1404(a) partially replaces the common law doctrine of *forum non conveniens*, the private and public factors traditionally used to decide motions to dismiss under that doctrine³ have also been used by courts to decide a motion under § 1404(a). *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). The relevant private factors include: availability of process to compel the presence of unwilling witnesses; costs of obtaining the presence of unwilling and willing witnesses; relative ease of access to sources of proof; and all other practical problems indicating the case can be tried more expeditiously and less expensively. *Triton Container Int'l, Ltd. v. Compania Anomina Venezolana de Navigacion*, No. 94-00055, 1994 WL 803257, at *2-3 (D. Guam Dec. 12, 1994). The relevant public factors include: the unfairness of imposing jury duty on local community members when no local issues are at stake; the local interest in having localized controversies decided at home; avoidance of unnecessary problems in conflict of laws or in the application of foreign law; and the administrative difficulty of court congestion. *Id.*

In support of its motion to transfer, the moving party bears the burden of making a “strong showing of inconvenience to warrant upsetting the plaintiff’s choice of forum.” *Triton Container*, at *2 (quoting *Decker*, 805 F.2d at 843). However, in judging the proper weight to be given plaintiff’s choice, this Court must consider both “the defendant’s business contacts with the chosen forum and [] the plaintiff’s contacts, including those relating to his cause of action. If the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff’s choice is entitled only to minimal consideration.” *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968).

² In reviewing a district court’s ruling on a motion to transfer pursuant to 28 U.S.C § 1404(a), the Federal Circuit applies the law of the regional circuit. *Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 836 (Fed. Cir. 2003).

³ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1947).

1 Although Guam is geographically closer to Taiwan and Japan, courts have found geographical
2 distance to a forum to be irrelevant unless the plaintiff resides in the forum. *See, e.g., Pac. Car &*
3 *Foundry*, 403 F.2d at 953, 955.

4 **B. The Case Should Clearly Be Transferred to the Northern District of**
5 **California for Convenience**

6 This case clearly should be transferred to the Northern District of California. All
7 of the convenience factors favor transfer to that district. In addition, because both FMA and co-
8 plaintiff Nanya USA reside there, it is evident that the Northern District of California has a much
9 greater interest in adjudicating this dispute.⁴ As noted above, though a party moving to transfer
10 an action must typically make a “strong showing of inconvenience” to warrant upsetting the
11 plaintiff’s choice of forum, *Triton Container*, 1994 WL 803257, at *2, in this case, Nanya’s
12 choice of forum is entitled to only minimum consideration because no substantial contacts with
13 Guam exist with respect to any of the parties. *See Pac. Car & Foundry*, 403 F.2d at 954-55.

14 **1. Nanya Could Have Brought This Action in the Northern District of**
15 **California**

16 There is no dispute that Fujitsu and FMA both have sufficient contacts with the
17 Northern District of California regarding the present suit such that Plaintiffs could have sued
18 there. FMA is located in that district and Fujitsu’s accused products are sold there.

19 **2. The Northern District of California Is More Convenient for FMA and**
20 **Nanya USA -- Both California Corporations**

21 FMA is headquartered in Sunnyvale, California. (Moore Decl. ¶ 2.)
22 Consequently, FMA’s fact witnesses and documents relevant to this litigation are located in the
23 Northern District of California. (Moore Decl. ¶ 20; Kitano Decl. ¶ 25.) The Northern District of

24 ⁴ Plaintiffs regularly appear in the U.S. District Court for the Northern District of California.
25 Indeed, a recent search of on-line databases revealed dozens of cases in which Plaintiffs presently or
26 recently have been part to litigation in the Northern District, including numerous patent and antitrust
27 litigations. Even in the present case, Plaintiffs have sought to avail themselves of the Northern District of
28 California court’s resources. For example, in their proposed scheduling order, Plaintiffs suggested
adopting the Northern District of California rules of practice in patent cases and also requested that a
mediation ordered in the Northern District of California action “also serve as a mediation in the Guam
Action.” (Pls. Mot. for Ct. Ordered Mediation and Mem. of P. & A. at 2).

California is also where Plaintiff Nanya USA maintains its headquarters. (Amended Guam Complaint, Dkt. No. 24 ¶ 2). Accordingly, virtually all of those parties' witnesses, documents, and other evidence will be found in the Northern District of California.

3. The Northern District of California Is More Convenient for Fujitsu

The Northern District of California is a much more convenient location for Fujitsu and its employees compared with Guam. Reasons for this include more options for transportation and scheduling. (Kitano Decl. ¶ 26.) In addition, because Fujitsu's subsidiary FMA is located in the Northern District of California, a number of Fujitsu's employees regularly travel there. (*Id.*) FMA also has cost-effective arrangements for accommodations for its out-of-town visitors that can be made available to Fujitsu employees. (*Id.*) Fujitsu also has cost-effective arrangements for transportation of documents to the Northern District of California. (*Id.* ¶ 27.) Finally, FMA can assist Fujitsu with logistics in relation to litigation matters. (*Id.*)

4. The Northern District of California Is Nearly As Convenient for Nanya

The Northern District of California is nearly as convenient for Nanya as Guam. For Nanya witnesses, only *one* non-stop flight from Taipei, Taiwan to Agana, Guam is offered at most,⁵ only on two business days during a typical week, and only at inconvenient times (after midnight). (*See* Exh. C hereto, Declaration of Lawrence T. Kass, March 29, 2007, ("Kass Decl.") ¶¶ 3-4 and Exhs. A-B). Aside from this one inconvenient and sporadically offered flight, the other travel option from Taiwan to Guam is to take a one-stop flight which involves a total travel time of about eight hours. (*Id.*) In contrast, several nonstop flights from Taipei, Taiwan to San Francisco, California are available each day of a typical week and involve a travel time of less than eleven hours. (*Id.*) Moreover, once in the Bay Area, Nanya's witnesses would be less than a 45 minute drive to their North American headquarters. By contrast, Nanya's witnesses would appear to have no business reason to otherwise travel to Guam.

⁵ Some months this flight is only offered on one business day and Sunday, instead of two business days, Saturday, and Sunday.

1 In addition, Nanya has acknowledged that all of its documents are already in
2 Texas, which is closer and more convenient to ship to California than to Guam. *See* [Nanya's]
3 Initial Disclosures Pursuant to Rule 26(a), N.D. Cal. 06-cv-06613, at 4-5 (Kass Decl. Exh. C).
4 No Nanya documents have been identified as being in Guam, and no Nanya witnesses have been
5 identified as being in Guam. *Id.*

6 **5. The Northern District of California Is More Convenient for Experts,**
7 **Third Parties and Third Party Witnesses**

8 The Northern District of California would be much more convenient for experts,
9 third parties and third party witnesses. If the litigation moves forward in Guam, all of the expert
10 witnesses would have to come from off-island for extended periods. This case involves complex
11 semiconductor technology and the experts will likely be professors and/or industry experts in this
12 field. The West Coast of the U.S. has a large number of suitable experts whereas none are
13 believed to be on Guam.

14 In addition, third parties and third party witnesses critical to the antitrust issues
15 would have to come to Guam at great inconvenience that may even preclude their live testimony.
16 The antitrust allegations involve an alleged "collusive pool" of "[m]anufacturers and distributors
17 of DDR SDRAM." (Amended Guam Complaint, ¶ 45.) Thus, antitrust evidence will depend
18 heavily on third parties in this alleged "collusive pool." Although Plaintiffs did not name these
19 third parties in the First Amended Complaint, the West Coast of the U.S. is the home to a large
20 number of the world's semiconductor companies. Even foreign semiconductor companies (like
21 Nanya and Fujitsu) tend to have subsidiaries or offices in California. Thus, California is a critical
22 location for these third parties. None of these companies are on Guam. This critical factor
23 strongly favors California as the more convenient location.

24 The Northern District of California is also much more convenient for various other
25 witnesses and for the production of documents both identified as located in Washington D.C. and
26 elsewhere in the continental United States. *See, e.g.,* Fed. R. Civ. P. 26(a)(1) Initial Disclosure,
27 N.D. Cal. 06-cv-06613, at 2-3, 7-8 (Kass Decl. Exh. D).

1 **6. The "Interests of Justice" Strongly Favor Transfer to the Northern**
2 **District of California**

3 The "interests of justice" under 28 U.S.C. § 1404(a) also favor transfer. There is
4 no dispute that the Northern District of California court has jurisdiction over all parties, while
5 jurisdiction in Guam is uncertain. There also can be no disputing California's interest in a
6 litigation involving two California corporations. On the other hand, it does not serve the interests
7 of justice to burden the courts or the citizens of Guam with participating in a complex litigation
8 and a long jury trial over an issue that has no connection to Guam. *Triton Container*, 1994 WL
9 803257, at *3; *see also Copitas v. Fishing Vessel Alexandros*, No. 98-00013, at *4 (D. Guam Oct.
10 5, 1998) (attached hereto as Exh. D), *aff'd*, 20 Fed. Appx. 744 (9th Cir. 2001) (unpublished).

11 **7. The Balance of Convenience Favors Transfer to the Northern District**
12 **of California**

13 The balance of convenience clearly favors transferring this action to the Northern
14 District of California. None of the relevant documents and/or witnesses are located in Guam
15 because none of the actions giving rise to Nanya's claims have any relation to Guam and neither
16 Nanya nor FMA resides in Guam. (Amended Complaint ¶¶ 1, 2, 3, 4.) Relevant documents
17 would have to be shipped to Guam and witnesses would have to travel from such places as
18 California and Washington D.C. to give testimony. *See Pac. Car*, 403 F.2d at 953.

19 There is not a single factor favoring convenience in Guam, and overwhelming
20 factors supporting convenience in the Northern District of California. To echo this Court's own
21 words, "[i]t is doubtful that Plaintiffs could have selected a United States forum that was more
22 distant than Guam is from the principal places of business of the respective parties." *Triton*
Container, 1994 WL 803257, at *3.

23 Accordingly, the convenience issues are very straightforward, and can be resolved
24 in favor of transfer without delay.

1 **IV. THE JURISDICTIONAL ISSUES ARE DIFFICULT AND UNCERTAIN**

2 **A. Nanya's Broad Jurisdictional Discovery Requests Are Causing Unnecessary**
 3 **Expense and Burden**

4 Nanya filed suit in Guam without sufficient basis to sustain jurisdiction, and since
 5 then has unduly multiplied the expense and burden of this litigation with jurisdictional discovery.
 6 Nanya issued a first set of jurisdictional document requests on December 14, 2006 which was
 7 essentially a fishing expedition. Nanya followed up on February 9, 2007 by issuing another set of
 8 even broader jurisdictional document requests.⁶ Thereafter, Nanya issued 77 interrogatories to
 9 Fujitsu Limited, and 77 interrogatories to FMA. That is more than *three times* the number of
 10 interrogatories normally allotted for an *entire case*. Nanya also issued 27 requests for admission
 11 to Fujitsu Limited and 27 requests for admission to FMA, again exceeding the number normally
 12 allotted for an entire case.

13 Furthermore, although Defendants have produced about 60,000 pages of
 14 information and have provided FMA's general counsel for a deposition last week, Nanya remains
 15 unsatisfied and has recently made additional unreasonable discovery demands. (*See* letter from
 16 Pascual to Murray of April 13, 2007 ("Nanya Letter", Exh. E hereto).) For example, item number
 17 2 in the Nanya Letter seeks the production of "all documents identifying the entities involved in
 18 the design, supply, manufacture, sales, solicitation, or purchase of the Accused Devices." This
 19 request covers, *inter alia*, every piece of paper and electronic record in the company that includes
 20 the name of any customer of any of the accused devices, which would potentially amount to
 21 hundreds of thousands of documents. After being explicitly told that this request was clearly
 22 burdensome (*see* email from Murray to Pascual dated April 15, 2007, Exh. F hereto), Nanya
 23 responded by filing yet another motion to compel production of this information on April 16,
 24 2007.

25 In addition to these clearly unreasonable document demands, the Nanya Letter
 26 further requests a 30(b)(6) deposition with categories so broad as to potentially require the

27
 28 ⁶ The parties agreed to the Scheduling Order providing for jurisdictional discovery on February 16, 2007, before the Supreme Court's *Sinochem* decision on March 5, 2007.

1 deposition of as many as half a dozen different corporate witnesses. (See Nanya Letter at 2.)
2 Thus, the jurisdictional discovery sought by Nanya will potentially exceed the total amount of
3 discovery typically undertaken for an entire case.

4 **B. Resolving Questions of Personal Jurisdiction Will Be Difficult at Best**

5 In filing suit, Nanya apparently did not have any evidence at all of personal
6 jurisdiction. Consequently, Nanya has had to resort not only to the broad discovery requests on
7 Defendants discussed above, but has also served third-party subpoenas on no less than seven
8 manufacturing companies and seven Guam retailers, in an attempt to establish some basis for a
9 “stream of commerce” theory of specific jurisdiction (*i.e.*, jurisdiction based on “the regular and
10 anticipated flow of products from manufacturer to distribution to retail sale”). Defendants do not
11 appear to have uncovered documents that would support such a theory and most of the
12 subpoenaed third parties who have responded have indicated that they have no responsive
13 documents. However, even if some “stream of commerce” documents are located, they are not
14 likely to easily settle the jurisdictional debate.

15 “‘Random,’ ‘fortuitous,’ or ‘attenuated’ contacts do not count in the minimum
16 contacts calculus.” *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1359
17 (Fed. Cir. 1998). Thus, even assuming some of Defendants’ products found their way to Guam,
18 such “contact” between Defendants and Guam is likely to be so attenuated as to not serve as a
19 proper basis for jurisdiction. *Id.* Further, Nanya will still have to make a *prima facie* showing
20 that these products infringe such that its claims can be said to arise out of any alleged contacts
21 with Guam. Evaluation of such contacts and infringement accusations will be so uncertain as to
22 make deciding the jurisdictional issues very difficult. While Nanya undoubtedly will argue that it
23 is developing a strong jurisdictional case, Fujitsu will undoubtedly argue the opposite.
24 Regardless of the outcome, the complexity and uncertainty in resolving the issue strongly favors
25 immediate transfer.

26 In addition to stream of commerce, Nanya is expected to argue that jurisdiction is
27 proper under the antitrust laws. But Nanya did not serve its original Guam complaint under
28 Section 12 of the Clayton Act and therefore it cannot now use it as a basis for jurisdiction over

1 Defendants. Moreover, Nanya has not alleged any facts whatsoever to support antitrust
2 jurisdiction over FMA. Nanya's antitrust allegations relate solely to Fujitsu. Specifically, the
3 allegations relate to Fujitsu's alleged assertion of Fujitsu patents, Fujitsu's alleged improper
4 settlement tactics, and Fujitsu's alleged price discrimination and "collusion" with third parties in
5 setting royalty rates. Nanya cannot make any of these allegations against FMA, and therefore it
6 cannot sustain jurisdiction over FMA under Section 12 of the Clayton Act. Consequently, Nanya
7 will have to rely solely on a complex stream of commerce theory for jurisdiction over FMA,
8 where intensely factual issues of whether certain alleged contacts are "random," "fortuitous," or
9 "attenuated" again are sure to be hotly disputed.

10 Accordingly, the questions of personal jurisdiction will be difficult and uncertain
11 at best.

12 **V. THE COURT SHOULD IMMEDIATELY TRANSFER FOR CONVENIENCE**

13 Efficiency, conservation of judicial resources, and avoidance of delay all strongly
14 favor immediate transfer under § 1404(a) for convenience without addressing the jurisdictional
15 and venue issues. Briefing on the § 1404(a) transfer issue can be easily finalized and the issue
16 can be decided at the Court's earliest convenience without any need for discovery. In fact, in the
17 California case, Plaintiffs filed a motion to transfer on § 1404(a) grounds and thus have already
18 prepared a brief on the convenience issues. Plaintiffs could therefore easily brief this limited
19 issue for the Court.

20 If the Court grants Defendants' § 1404(a) motion and transfers the case to
21 California, the jurisdictional issues will be moot, and significant efficiencies will be gained. The
22 court in *Multistate Legal Studies, Inc. v. Marino*, 1996 WL 786124 (C.D. Cal. 1996) gained such
23 efficiencies in exactly this way. There, the court found that immediate transfer to another district
24 for convenience would serve the interests of justice because it would avoid difficult jurisdictional
25 issues and would render jurisdictional discovery moot. *Id.* at *8.

26 The facts and reasoning of *Multistate* are instructive. The Central District of
27 California was presented with defendants' motion to dismiss for lack of personal jurisdiction and
28 improper venue or, in the alternative, to transfer the action to another district pursuant to 28

1 U.S.C. § 1404(a) . *Multistate*, 1996 WL 786124, at *1. In response to the defendants' motion,
 2 the plaintiff made a *prima facie* showing that it could assert personal jurisdiction over one
 3 defendant -- "BLP." However, it was unclear "at first blush" whether the court could assert
 4 jurisdiction over two other defendants -- "Marino or Grufferman." *Id.* at *8. The plaintiff
 5 therefore sought discovery to prove its allegation that the court assert personal jurisdiction over
 6 both. *Id.*

7 While acknowledging that it would have normally granted the plaintiff's discovery
 8 request, the *Multistate* court found that it would best "serve the interests of justice within the
 9 meaning of § 1404(a) " to immediately grant defendants' § 1404(a) motion to transfer:

10 If this Court were to retain jurisdiction over this case, the Court
 11 would have granted Plaintiff's request. It is in this Court's
 12 discretion to permit discovery to aid in the determination of ...
 13 personal jurisdiction. However, because this Court is transferring
 this case to the Southern District of New York, **Plaintiff's request
 to conduct discovery on this issue is moot.**

14 *Id.* at *8 (citations omitted; emphasis added). The court reasoned that courts "have repeatedly
 15 held that a change of venue from a forum where there is a difficult question of personal
 16 jurisdiction or venue to a district where there are not such uncertainties serves the interests of
 17 justice." *Id.* at *11. The court noted that addressing jurisdictional issues would involve further
 18 discovery, further briefing and potentially an evidentiary hearing, requiring the parties and the
 19 court to expend substantial efforts. *Id.* The court further found that "these efforts will consume
 20 time, energy and resources of all involved whether the Court ultimately retains jurisdiction or
 21 concludes that it cannot assert jurisdiction over some or all of the defendants, compelling a
 22 transfer or dismissal." *Id.* Accordingly, the court ordered immediate transfer in the interests of
 23 justice.

24 As the court in *Multistate* noted, other district courts have repeatedly taken the
 25 same approach. For example, in *Datasouth Computer Corp. v. Three Dimensional Techs., Inc.*,
 26 719 F. Supp. 446, 453 (W.D.N.C. 1989), the court ordered transfer based in part on its finding
 27 that it would "require a substantial expenditure of additional resources" to resolve a "serious
 28 question" of personal jurisdiction, whereas transfer to a district "where [defendant] is

1 incorporated and is certainly subject to the *in personam* jurisdiction” would “moot the issue of
 2 personal jurisdiction” and “save judicial resources by making it unnecessary to decide the
 3 problematic jurisdictional issue.”

4 Likewise, the court in *Kahhan v. City of Fort Lauderdale*, 566 F. Supp. 736, 740
 5 (E.D. Pa. 1983), found the public interest in conserving judicial resources supported transfer.

6 Whether sufficient contacts exist to create *in personam* jurisdiction
 7 ... is in doubt. Neither of these questions would exist in [the
 8 transferee court]: *in personam* jurisdiction over a resident
 9 corporation would be clear.... “Substantial time, money and effort
 10 will be required to determine these preliminary jurisdictional issues
 11 which are rendered unnecessary if the action is transferred to [a
 12 district] which has *in personam* jurisdiction over the defendant and
 is a forum where the action might have been brought. A transfer,
 obviating a jurisdictional difficulty, has been found to serve the
 interests of justice within the meaning of that language in
 §1404(a).”

13 *Id.*; see also *Donnelly v. Klosters Rederi A/S*, 515 F. Supp. 5, 7 (E.D. Pa. 1981) (same); *Terukuni*
 14 *Kaiun Kaisha, Ltd. v. C.R. Rittenberry & Assocs., Inc.*, 454 F. Supp 418, 422-23 (S.D.N.Y. 1978)
 15 (same); *X-Rail Sys., Inc. v. Norfolk & W. Ry. Co.*, 485 F. Supp. 553, 555 (D.N.J. 1980)
 16 (Jurisdictional “deposition and document discovery began [], but the proper remedy is to
 17 transfer the case.... Transfer will ... strike a constructive blow in support of the need to eliminate
 18 avoidable discovery, and aid in the inexpensive determination of the action... since it will render
 19 moot the dispute over minimum contacts...” (citations omitted)).

20 And as noted above, the Supreme Court itself has now expressly encouraged
 21 district courts to take the less burdensome course, *i.e.*, immediately address convenience when
 22 considerations weigh heavily in favor of dismissal or transfer while jurisdictional issues are
 23 difficult to determine. *Sinochem*, 549 U.S. at ___, 127 S.Ct. at 1194.

24 As in *Multistate*, this Court can best “serve[] the interests of justice within the
 25 meaning of § 1404(a) ” by first deciding the § 1404(a) issue, thereby possibly avoiding
 26 unnecessary burden on itself and the parties of jurisdictional issues. *Id.* at *11. As noted above,
 27 doing so will require no discovery and briefing can be completed within the month. There would
 28 be no significant delay. Plaintiffs themselves argue that efficiency, conserving judicial resources,

1 and proceeding without delay should weigh heavily in determining how to proceed. (See
2 Plaintiffs' Motion to Clarify Magistrate Judge's Order and Motion to Compel Substantive
3 Responses to Plaintiffs' Discovery Requests, at 4.)

4 If the Court transfers the case from Guam "where there is a difficult question of
5 personal jurisdiction or venue to [California] where there are not such uncertainties," the
6 jurisdiction and venue issues will be rendered moot, thereby eliminating all unnecessary
7 jurisdiction issues. *Multistate*, at *11.

8 **VI. CONCLUSION**

9 Significant resources of the parties and the Court may be saved by addressing the
10 convenience issues now. The factors favoring transfer to the Northern District of California,
11 where two parties reside, are substantial. Accordingly, Defendants respectfully request that the
12 Court immediately transfer this case to the Northern District of California.

13 Respectfully submitted this 17th day of April, 2007.

14 **CALVO & CLARK, LLP**
15 **MILBANK, TWEED, HADLEY**
16 **& MCCLOY LLP**

17 *Attorneys for Defendants*

18 *Fujitsu Limited and*

19 *Fujitsu Microelectronics America, Inc.*

20 By: 

21 **DANIEL M. BENJAMIN**

EXHIBIT A

FILED
DISTRICT COURT OF GUAM
DEC - 5 2006

**UNITED STATES DISTRICT COURT
DISTRICT OF GUAM**

**MARY L.M. MORAN
CLERK OF COURT**

**NANYA TECHNOLOGY CORP., and
NANYA TECHNOLOGY CORP.
U.S.A.**

Plaintiffs,

v.

**FUJITSU LIMITED, FUJITSU
MICROELECTRONICS AMERICA,
INC.,**

Defendants.

CIVIL CASE NO. 06-CV-00025

**MICHAEL M. MOORE DECLARATION
IN SUPPORT OF FUJITSU
MICROELECTRONICS AMERICA,
INC.'S MOTION TO DISMISS OR
TRANSFER TO THE NORTHERN
DISTRICT OF CALIFORNIA AND FOR A
MORE DEFINITE STATEMENT**

Michael M. Moore, deposes and says

1. I am Vice President and General Counsel of Fujitsu Microelectronics America, Inc. ("FMA"). I make this declaration in support of the motion by FMA to dismiss the complaint for lack of personal jurisdiction and improper venue or alternatively to transfer the case to the Northern District of California and for a more definite statement. The following statements are based on my personal knowledge, my review of documents prepared and maintained by FMA in the ordinary course of business, and upon information provided by FMA's employees responsible for and with knowledge of the business records of FMA.

2. FMA is a corporation organized and existing under the laws of California, and maintains its principal place of business at 1250 E. Arques Avenue, M/S 333, Sunnyvale, California 94085-5401.

3. FMA is engaged in the business of sales and design of products for networking, wireless, automotive, industrial, consumer, and security applications.

ORIGINAL

4. FMA does not maintain any offices in Guam, and has no operations, affiliates, employees or salespersons in Guam.

5. Guam is not part of FMA's sales territory.

6. FMA owns no real or personal property in Guam.

7. FMA has no bank accounts in Guam.

8. FMA leases no office space or other facility of any kind in Guam and does not maintain a telephone, telex or telefax number in Guam.

9. FMA maintains no Guam post office box or street address.

10. FMA is not registered to do business in Guam.

11. FMA does not file tax returns in Guam.

12. FMA does not advertise its products or services in any local media in Guam.

13. FMA has no directors, officers or employees in Guam and has appointed no agents in Guam for service of process.

14. FMA does not sell DRAMs anywhere. Our SAP records further indicate that FMA's last sale of a DRAM product occurred on October 12, 2001.

15. Based on a data run through FMA's SAP record system, FMA has a total of 4,647 customer records. None of them has a Guam address.

16. FMA has never been party to a lawsuit or legal proceeding in Guam (according to a search of Public Access to Court Electronic Records (PACER), which dates back to January 1, 1997).

17. FMA has filed no papers with any agency of Guam, has never negotiated or executed any agreements in Guam, nor executed any agreements that call for their performance in Guam.

18. Prior to the filing of Nanya's complaint, FMA has had no correspondence with Nanya of any kind in Guam nor in any way related to any proposed business in Guam.
19. FMA has no documents relevant to this lawsuit in Guam and knows of no fact witnesses in Guam.
20. All of FMA's documents and fact witnesses are located in the Northern District of California because that is where FMA maintains its headquarters.
21. In its Amended Complaint, Nanya alleges that "FMA manufactures a broad range of microelectronics with the knowledge that they would be used in a significant number of consumer products sold in the United States and the Territory of Guam." (First Amended Complaint at ¶ 21.) However, FMA does not manufacture microelectronics of any kind. Further, to the best of my knowledge, no FMA customer has ever told us that it planned to market its products in Guam.
22. In its Amended Complaint, Nanya refers to meetings that took place in Taiwan and infringement proceedings initiated by Defendants against Nanya in Tokyo District Court. (See First Amended Complaint at ¶¶ 27 and 31.) FMA was not a party to these negotiations and is not involved at all in the Tokyo action.
23. FMA has no ownership interest in or control over any patent currently at issue in this case.
24. Prior to receiving Nanya's Amended Complaint FMA had no notice of Nanya's claims involving U.S. Patent No. 6,104,486, and had no notice that Nanya

Technology Corp. USA would be joined in this action.

I, Michael M. Moore, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on December 4, 2006

By: 
Michael M. Moore

NY2:#4718800

Friday, April 06, 2007

Service Date(s) 8/18/1999 thru

Please cut along dashed line below, and return top portion with payment

Patient Name:

CAMACHO, LUIS C

Account Number:

27114652

REV CD	SVC DTE	PST DTE	SVC CODE	SERVICE DESCRIPTION	HCPC	QTY	AMOUNT
333	8/16/1999	8/17/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/17/1999	8/18/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/18/1999	8/19/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/19/1999	8/20/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
270	8/20/1999	8/25/1999	70003635	IR DISTILLED H2O L	A4849	1	\$21.00
333	8/20/1999	8/23/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/20/1999	8/23/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/20/1999	8/23/1999	28001509	PORT FILM	77417	1	\$78.00
333	8/20/1999	8/23/1999	28501809	CONT PHYSICS QA SUPPORT	77336	1	\$437.00
250	8/23/1999	8/23/1999	30022912	SUCRALPATE 1GM/10ML SUSP B*		480	\$85.90
333	8/23/1999	8/24/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/23/1999	8/24/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/24/1999	8/25/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/24/1999	8/25/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/24/1999	8/25/1999	28001509	PORT FILM	77417	1	\$78.00
333	8/24/1999	8/25/1999	28501809	CONT PHYSICS QA SUPPORT	77336	1	\$437.00
333	8/25/1999	8/26/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/25/1999	8/26/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/26/1999	8/27/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/26/1999	8/27/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/27/1999	8/30/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/27/1999	8/30/1999	28001509	PORT FILM	77417	1	\$78.00
333	8/27/1999	8/30/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/27/1999	8/30/1999	28501809	CONT PHYSICS QA SUPPORT	77336	1	\$437.00
300	8/30/1999	8/31/1999	28001731	HGB & HCT	86027	1	\$20.00
333	8/30/1999	8/31/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/30/1999	8/31/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/2/1999	9/3/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00
333	8/2/1999	9/3/1999	28001401	RAD THER - CMLPX 6-10	77413	1	\$450.00

Patient Name:							Account Number:
CAMACHO, LUIS C							27114652
REV CD	SVC DTE	PST DTE	SVC CODE	SERVICE DESCRIPTION	HCPC	QTY	AMOUNT
333	8/3/1999	8/7/1999	28001509	PORT FILM	77417	1	\$78.00
333	9/3/1999	9/7/1999	28501809	CONT PHYSICS QA SUPPORT	77336	1	\$437.00
333	9/3/1999	9/7/1999	28001401	RAD THER - CMLX 8-10	77413	1	\$450.00
333	9/3/1999	9/7/1999	28001401	RAD THER - CMLX 8-10	77413	1	\$450.00
	1/7/2000	1/7/2000	90008880	GMHP PAYMENT		-1	(\$6,780.20)
	1/7/2000	1/7/2000	93001494	GUAM MEM HEALTH PLAN DISC		-1	(\$2,905.80)
	3/5/2001	3/5/2001	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		-1	(\$2,315.00)
	3/5/2001	3/5/2001	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		1	\$2,315.00
	10/10/2003	10/10/2003	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		1	\$2,380.90
	10/10/2003	10/10/2003	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		-1	(\$2,380.90)
	11/25/2003	11/25/2003	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		-1	(\$2,380.90)
	11/25/2003	11/25/2003	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		1	\$2,380.90
	11/25/2003	11/25/2003	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		-1	(\$2,380.90)
	11/25/2003	11/25/2003	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		1	\$2,380.90
	11/25/2003	11/25/2003	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		-1	(\$2,380.90)
	11/25/2003	11/25/2003	91900009	ADJ-PAYOR TO PAYOR (MANUAL)		1	\$2,380.90
							\$2,380.90

EXHIBIT B

FILED

DISTRICT COURT OF GUAM

DEC 18 2006

MARY L.M. MORAN
CLERK OF COURT

**UNITED STATES DISTRICT COURT
DISTRICT OF GUAM**

**NANYA TECHNOLOGY CORP., and
NANYA TECHNOLOGY CORP.
U.S.A.**

Plaintiffs,

v.

**FUJITSU LIMITED, FUJITSU
MICROELECTRONICS AMERICA,
INC.,**

Defendants.

CIVIL CASE NO. 06-CV-00025

**SHIGERU KITANO'S DECLARATION IN
SUPPORT OF FUJITSU LIMITED'S
MOTION TO DISMISS OR TRANSFER
TO THE NORTHERN DISTRICT OF
CALIFORNIA AND FOR A MORE
DEFINITE STATEMENT**

I, Shigeru Kitano, declare as follows:

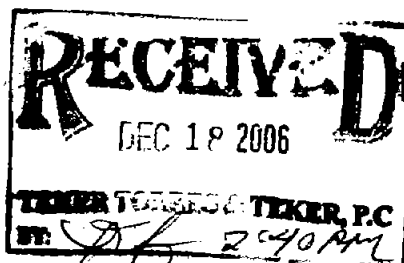
1. I am a Deputy General Manager in the Industry Relations Division of the Law and Intellectual Property Unit of Fujitsu Limited ("Fujitsu Ltd."). I make this declaration in support of the motion by Fujitsu Ltd. to dismiss the complaint for lack of personal jurisdiction and improper venue or alternatively to transfer to the case to the Northern District of California. The following statements related to Fujitsu Ltd. are based on my personal knowledge, my review of documents prepared and maintained by Fujitsu Ltd. in the ordinary course of business, and upon information provided by Fujitsu Ltd.'s employees responsible for and with knowledge of the business records of Fujitsu Ltd. Statements made herein related to entities other than Fujitsu Ltd. are based on information and belief after reasonable inquiry.

2. Fujitsu Ltd. is a company organized and existing under the laws of Japan, and maintains its principal place of business at Shiodome City Center, 1-5-2, Higashi-Shimbashi, Minato-ku Tokyo, 105-7123, Japan.

RECEIVED

DEC 18 2006

B. Moran
UNPINGCO & ASSOCIATES, LLC



3. Fujitsu Ltd. is engaged in the business of research, design, manufacture, and provision of information technology and communications products and services.

4. Fujitsu Ltd. does not maintain any offices in Guam, and has no operations, affiliates, employees or salespersons in Guam.

5. Fujitsu Ltd. owns no real or personal property in Guam.

6. Fujitsu Ltd. has no bank accounts in Guam.

7. Fujitsu Ltd. does not lease any office space or other facility of any kind in Guam and does not maintain a telephone, telex or telefax number in Guam.

8. Fujitsu Ltd. does not maintain a Guam post office box or street address.

9. Fujitsu Ltd. is not registered to do business in Guam.

10. Fujitsu Ltd. does not file tax returns in Guam.

11. Fujitsu Ltd. does not advertise any products or services in any local media in Guam.

12. Fujitsu Ltd. has no directors, officers or employees in Guam and has not appointed agents in Guam for service of process.

13. Fujitsu Ltd. has never been party to a lawsuit or legal proceeding in Guam (according to a search of Public Access to Court Electronic Records (PACER), which dates back to January 1, 1997).

14. Fujitsu Ltd. has not filed papers with any agency of Guam relating to the subject matter of this suit.

15. Fujitsu Ltd. has neither negotiated nor executed any agreements, nor had any correspondence with Nanya of any kind, in Guam relating to the subject matter of this suit.

16. Fujitsu Ltd. does not sell or distribute any products in Guam, including to the U.S. Armed Forces Exchanges in Guam.

17. In its First Amended Complaint, Nanya makes certain allegations concerning Fujitsu Computer Products of America, Inc., Fujitsu General New Zealand Limited and Fujitsu Ten. On information and belief, after reasonable inquiry, none of these companies have any of the contacts with Guam addressed above in paragraphs 4-16.

18. Fujitsu Ltd., Fujitsu Microelectronics America, Inc., Fujitsu Computer Products of America, Inc., Fujitsu General New Zealand Limited and Fujitsu Ten are independently operated and Fujitsu Ltd. does not exercise control over the daily business operations of these other entities.

19. Fujitsu Ltd. does not formulate the general business policies and strategies of Fujitsu Microelectronics America, Inc., Fujitsu Computer Products of America, Inc., Fujitsu General New Zealand Limited and Fujitsu Ten.

20. Fujitsu Ltd., Fujitsu Microelectronics America, Inc., Fujitsu Computer Products of America, Inc., Fujitsu General New Zealand Limited and Fujitsu Ten observe all corporate formalities and document any financial transactions between Fujitsu Ltd. and these other entities.

21. Fujitsu General New Zealand Limited is at least partially owned by Fujitsu General Japan, in which Fujitsu Ltd. has a 46% stock share, and which is not a Fujitsu Ltd. subsidiary.

22. In its First Amended Complaint, Nanya asserts three patents against Fujitsu Ltd. and states that all three patents relate to semiconductors. (First Amended Complaint for Antitrust Law Violations, Patent Infringement, And for Declaratory Relief at ¶¶ 58, 66 and

74.) Neither Fujitsu Computer Products of America, Inc., Fujitsu General New Zealand Limited or Fujitsu Ten manufacture or sell Fujitsu Ltd.'s semiconductor devices.

23. In its First Amended Complaint, Nanya refers to meetings that took place in Taiwan and infringement proceedings initiated by Defendants against Nanya in Tokyo District Court. Neither the Taiwanese meetings nor the Japanese proceedings have any connection with Guam.

24. Fujitsu Ltd. has no documents relevant to this law suit in Guam and knows of no fact witnesses in Guam.

25. Fujitsu Ltd.'s co-defendant Fujitsu Microelectronics America, Inc. (FMA) is located in Sunnyvale, California. Consequently, FMA's fact witnesses and documents relevant to this litigation are located in Northern District of California.

26. The Northern District of California is a much more convenient location for Fujitsu Ltd. and its employees compared with Guam. Reasons for this include more options for transportation and scheduling. In addition, because Fujitsu Ltd.'s subsidiary FMA is located in the Northern District of California, a number of Fujitsu Ltd.'s employees regularly travel there. FMA also has cost-effective arrangements for accommodations for its out-of-town visitors that can be made available to Fujitsu Ltd. employees.


27. The Northern District of California is also a much more convenient location for Fujitsu Ltd. with respect to documents. Because FMA is located there, Fujitsu Ltd. has cost-effective arrangements for transportation of documents to the Northern District of California. In addition, documents can be transmitted electronically to FMA where they can be efficiently and cost-effectively printed by FMA. Finally, FMA can assist Fujitsu Ltd. with logistics in relation to litigation matters.

28. On November 10, 2006 (Japan time), I received an email sent from Nanya's counsel on November 9, 2006 (US time) attaching Nanya's Original Complaint without exhibits. On November 13, 2006, I received a package from Nanya's counsel delivered via Federal Express containing Nanya's Original Complaint with exhibits. Neither the email nor the Federal Express package included a copy of the Summons. To my knowledge, Fujitsu has received no other emails or packages from Nanya or its counsel regarding the Original Complaint.

29. On December 1, 2006 (Japan time), I received an email sent from Nanya's counsel on November 30, 2006 (US time) attaching Nanya's Amended Complaint without exhibits. On December 4, 2006, I received a package from Nanya's counsel delivered via Federal Express containing Nanya's Amended Complaint with exhibits. Neither the email nor the Federal Express package included a copy of the Summons. To my knowledge, Fujitsu has received no other emails or packages from Nanya or its counsel regarding the Amended Complaint.

I, Shigeru Kitano, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.
Executed on December 15, 2006

By:


Shigeru Kitano